



How to Secure Your Arbitration Funding – The Process and its Pitfalls

Funding Landscape in Latin America

A lot is different in Latin America, compared to the Anglo-American world. This is also the case as regards litigation or arbitration funding. The language to start with, civil law v common law, duration of court proceedings, popularity of arbitration, the price of legal advice and much more. Whereas litigation funding has a long history in the UK and in the United States, its twin brother – arbitration finance – is still in its infancy in Latin America.

However, the trend in many (not all) Latin American jurisdictions is obvious. Arbitration has become more interesting as proceedings appear to be more reliable, duration more predictable and international enforceability – relatively – easy. The legal skillset is also at hand.

All this led to the establishment of local third party funders in the past years like Leste in Brazil, Lexfinance in Peru or specialised Carpentum Capital operating out of Switzerland but with lawyers on the ground in LatAm. Most recent Hakamana was set up in Chile. These funders are perfectly suited to serve growing local demand and complement or replace bigger Anglo-American investors, usually only funding investor state disputes or other very pricy cases.

Whereas demand is increasing, awareness of arbitration finance in Latin America is still very low. And even if the very basics are known, there are a couple of misconceptions around.

The biggest being that arbitration funding would only be required by clients, lacking of resources to finance a legal proceeding. This is a very traditional view of third party funding and may indeed be the case in jurisdictions who have a very young market in that respect. In the US according to a study on litigation funding from 2019, less than 30% of clients revert to litigation funding for that reason. The vast majority makes use of it as a financing tool in order to hedge litigation risks, outsource legal costs or free up working capital.

Another common misunderstanding is that a funder would acquire the litigation rights, which is not the rule (but it is possible under certain circumstances, eg by way of monetizing an award). Funders usually assume the cost risk. All expenses relating to arbitrators, arbitral institution, experts or law firms are borne by the funding partner up to an amount of committed capital, which is agreed beforehand. In case of a successful outcome, the result is shared – it could be a percentage of the result, or a multiple of the investment or a combination. If the case is lost, investment is also gone. Hence the risk



contributed by:



is high, which is why only a fraction of cases will pass the scrutiny.

The Process

In order to survive this process, you should first know, how it works. Each investor may break its process in to various stages, but it always comes down to three crucial steps:

- At the outset confidentiality will be agreed, conflicts must be cleared and the funder will check whether a potential investment would be in line with internal guidelines or appetite. Specific proceedings may be ruled out, minimum or maximum investments set and ethical standards applied. That's the easy part.
- In a second round essential documentation is shared, such as basic contracts, correspondence, legal opinions, financial information of counterparty, expert valuations etc. Also important: the budget of the case with an anticipated cash-flow. This phase is the internal due diligence or 'first level' review. The funder will decide, if it can invest in the case and calculate on what terms it would do so potentially. If positive, a non-binding offer is made and the client signs a term sheet. At this stage the investor gains exclusivity to

pursue the investigations for a certain time frame. Most cases won't pass this stage either because the probability of success is not high enough, realistic outcome is lower than expected, the counterparty not sufficiently solvent or the case may take too long.

- If terms are agreed in principle and no smoking gun detected, the funder will spend even more time and money on an external due diligence or 'second level' review. Another lawyer than the client's one will opine on various aspects of the case. If claim evaluation is an issue, an additional expert may be required to review damage reports, or arbitrators for a specific industry may be asked to share their view on custom and practise in that industry. All this should happen in a speedy and transparent fashion, as the client will be eager to get the final approval for his arbitration finance.

In theory the whole process should take a couple of weeks only, but depending on the complexity and value of the case it may easily take months. Don't be shy to ask your funder for transparency and commitment to timelines.

The Funder's View and How to avoid Pitfalls

On the other hand, you can also accelerate the process of arbitration finance in Latin America, if you know what the investor will look at.

You may be surprised, but the merits of the case are not the core issue. It will just be assumed that you don't come around with a hopeless case, invented stories or a useless lawyer.

It's the economy of the case. Starting with the collectability and ending with the cost-to-demand ratio. Your case may be as good as it gets on paper, but if you pursue this against a soon to become insolvent party, it does not

terms of size and jurisdiction as well as understanding for the local legal culture;

- think twice (at least) about the economics of the case. Potential outcomes, realistic result, duration and cash-flows are to be considered;
- work with a capable lawyer having a good track record in the legal sector at stake;
- have crucial documentation at hand and avoid piecemeal production of documents;

“THE MERITS OF THE CASE ARE NOT THE CORE ISSUE. FUNDERS LOOK AT THE ECONOMICS OF THE CASE.”

really help. The quantification of a *realistic* outcome, rarely equalling the demand, comes next.

The funder will also look at a worst case budget and how it will be paid out. Worst case in our world not being a lost arbitration or litigation, but a proceeding going through annulment and up to execution. Too many lawyers or general counsels omit to think beyond the first award.

Therefore and in order to shorten the time up to a positive funding decision, you should:

- target the right investor. Ideally someone with the appetite for your arbitration in

- be transparent and disclose the good, the bad and the ugly. Rest assured that the investor will find the weak spots anyway.

If you understand the process and know that the investor tackles a claim from a slightly different angle, arbitration finance in Latin America or elsewhere will be no secret science, but an accessible tool of dispute resolution. ■